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IN THE

Supreme Court of the United States

MAJOR GENERAL JAMES H. LIPSCOMB III, in his official capacities as the Adjutant General of the State of Mississippi, of the Mississippi Militia, of the Mississippi National Guard, and as Executive Head of the Mississippi Military Department and the Mississippi Militia, the Mississippi National Guard and the Mississippi Military Department,

Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, in her official capacity as Regional Director of the Federal Labor Relations Authority, Atlanta Region and LINDA J. NORWOOD, in her former official capacity as Acting Regional Director of the Federal Labor Relations Authority, Atlanta Region,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Federal Labor Relations Authority has the power to order state National Guards and their state Adjutants General* to participate in federal union representation elections concerning Guard personnel.

Whether the valuable Tenth and Eleventh Amendment rights of a state official and a state agency may be trumped by federal statute, when Congress lacks the constitutional authority to pierce those immunities with its Article I powers.

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* Adjutants General are the senior military commanders of each state's National Guard. They are the National Guard analogue to the Chairman of the Joint Chiefs of Staff in the federal military. For the convenience of the Court, a Wire Diagram reflecting the relationship of the various military entities and persons at issue herein is included at App. J, 117a.

LIST OF PARTIES

Parties to the proceedings are those listed in the caption, to wit:

PETITIONERS:

Major General James H. Lipscomb III, in his official capacities as: the Adjutant General of the State of Mississippi; of the Mississippi Militia; of the Mississippi National Guard; and as Executive Head of the Mississippi Military Department

The Mississippi Militia

The Mississippi National Guard

The Mississippi Military Department

RESPONDENTS:

Federal Labor Relations Authority

Nancy Speight, in her official capacity as Regional Director of the Federal Labor Relations Authority, Atlanta Region

Linda J. Norwood, in her former official capacity as acting Regional Director of the Federal Labor Relations Authority, Atlanta Region

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Major General James H. Lipscomb III, in his official capacities as the Adjutant General of the State of Mississippi, of the Mississippi Militia, of the Mississippi National Guard, and as Executive Head of the Mississippi Military Department and the Mississippi Militia, the Mississippi National Guard and the Mississippi Military Department,

respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (App. B, 3a) is reported at 333 F.3d 611 (5th Cir. 2003).

The district court opinion (App. D, 22a) is reported at 200 F.Supp.2d 650 (S.D. Miss. 2001).

JURISDICTION

The judgment and opinion of the Court of Appeals affirming the district court in favor of Respondents was entered on June 24, 2003. App. B, 3a. A timely Petition for Rehearing En Banc, as well as a Petition for Panel Rehearing was filed by the Petitioners in the Fifth Circuit on July 30, 2003. On August 22, 2003, the Fifth Circuit denied both Petitions. App. A, 1a.

The jurisdiction of this Court is timely invoked by Petitioners pursuant to 28 U.S.C. § 1254(1). Petitioners, Plaintiffs below, invoked federal question jurisdiction in the district court to review a complaint for declaratory and injunctive relief concerning alleged violations of federal statutes and the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. X, which provides in part: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." App. F, 50a.

U.S. Const., amend. XI, which provides in part: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." App. F, 50a.

Miss. Const. art. V, § 119, which provides in part: "The governor shall be commander-in-chief of the army and navy of the state, and of the militia, except when they shall be called into the service of the United States." App. G, 51a.

5 U.S.C. § 1204(a)(2), is reproduced in App. H, 52a.

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5 CFR § 2421.4, is reproduced in App. H, 70a.

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Miss. Code Ann. § 33-5-1, is reproduced in App. H, 72a.

STATEMENT OF THE CASE

A. Proceedings and Disposition in the Lower Courts.

This case involves the coercive acts of federal instrumentality, the Federal Labor Relations Authority ("FLRA"), against a state agency, the Mississippi National Guard ("Mississippi Guard") and its Adjutant General, who is a state official. 66a, 71a. At the urgence of a private union, Association of Civilian Technicians, the FLRA ordered the Mississippi Guard and its Adjutant General to submit to its federal power and to hold a federal union election concerning Mississippi Army National Guard Technicians ("Military Technicians"), a type of Guard personnel who work for the Guard full-time under 32 U.S.C § 709. 6a, 104a-109a.

After exhausting administrative remedies, on July 24, 2001, Petitioners filed the instant civil Action. App. I, 73a. Petitioners seek only equitable relief and contend that Respondents are acting in excess of their statutory powers and are violating these state actors' Tenth and Eleventh Amendment constitutional rights. 73a.

On December 19, 2001, the district court issued a memorandum opinion and order denying Respondents' motion to dismiss for lack of subject matter jurisdiction, denying Petitioners' motion for a preliminary injunction and/or for summary judgment, and granting Respondents summary judgment. App. D, 22a.

On the merits, the district court rejected Petitioners' statutory construction arguments, and found the Mississippi Guard to be a federal executive "agency" when administering Mississippi Army National Guard Military Technicians under 5 U.S.C. § 7103(a)(3), of the Federal Service Labor-Management Relations Act ("Labor Management Act"). 40a. In reaching this conclusion, the district court mistakenly found the Mississippi Guard to be a subpart of the federal National Guard of the United States, which is a

federal reserve component under 10 U.S.C. § 10101. 40a. The district court further concluded that this putative federal agency status trumped Petitioners' Tenth and Eleventh Amendment rights, allowing the court to avoid addressing them altogether. 44a-45a n.15.

On January 8, 2002, the district court entered a final judgment effectuating its prior opinion and order. App. C, 19a. On January 11, 2002, Petitioners timely filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit.

The judgment and opinion of the Court of Appeals affirming the district court in favor of Respondents was entered on June 24, 2003. App. B, 3a. In its decision, the Fifth Circuit panel affirmed the district court's rulings. 18a.

A timely Petition for Rehearing En Banc, as well as a Petition for Panel Rehearing, was filed by Petitioners in the Fifth Circuit. On August 22, 2003, the Fifth Circuit denied both Petitions, and this Petition follows. App. A, 1a.

B. Facts.

For the convenience of the Court, a Wire Diagram reflecting the relationship of the various military entities and persons at issue herein is included at App. J, 117a.

Petitioner the Mississippi Militia, of which Petitioner the Mississippi Guard is a subset, is composed of the "[n]ational guard, the Mississippi State Guard,[1] and the unorganized militia." Miss. Code Ann. § 33-5-1. App. H, 72a. Pursuant to Miss. Code Ann. § 33-1-1(d) the "Mississippi National

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[1] The Mississippi State Guard - an entity separate and distinct from the Mississippi Guard (Petitioner here) - is a state defense force exempt from being impressed into the Armed Forces of the United States. *See* 32 U.S.C. § 109(c); *see also Perpich*, 496 U.S. at 352 (discussing state defense forces). Essentially, the Mississippi State Guard is available to take up state duties for the Mississippi Guard, in case the Mississippi Guard deploys out of state.

Guard [means] that part of the organized militia of this state which is organized, equipped and federally recognized under the provisions of the laws of the United States and of the State of Mississippi relating to the National Guard." *Id.*

The Governor of Mississippi, not the President of the United States, is the Commander in Chief of the Mississippi Guard (unless impressed into federal service). Miss. Code Ann. § 33-3-1; Miss. Const. art. V, § 119. 51a. This is because, unless called forth by the President, the respective states' National Guards are state militias, not federal military entities. *Perpich v. DOD*, 496 U.S. 334, 350-51 (1990) (discussing the three "hats" worn by Guardsmen and recognizing that the militias are state entities); *Jones v. New York State Div. of Military Affairs*, 166 F.3d 45, 49 (2d Cir. 1999) (holding that both the New York military department and National Guard are state entities entitled to Eleventh Amendment immunity). 111a.

Likewise, the Mississippi Military Department is a department of the executive branch of the State of Mississippi, Miss. Code. Ann. § 33-3-3 (1972), and therefore also a state agency. *Id.* 71a. Essentially, the Mississippi Military Department is the Mississippi state analogue to the federal Department of Defense. In other words, it is the state agency that administers the various parts of the Mississippi Militia.

The Adjutant General is a *state*, not federal, officer. Under state law, the Adjutant General is the "[e]xecutive head of the [Mississippi Military] department, and, as such, subordinate only to the governor in matters pertaining thereto." *Id.*; *see* 32 U.S.C. § 314 (state law sets duties of the Adjutant General); *see also* Miss. Const. art. V, § 119; Miss. Code Ann. § 33-3-1. 71a. In addition to serving as the executive head of the Mississippi Military Department, a state agency, the Adjutant General is the chief military officer of the various parts of the Mississippi Militia, including the Mississippi Guard, and is "[s]ubordinate only to the Governor

in matters affecting the . . . militia of this state." Miss. Code Ann. § 33-3-7 (1972). 71a. The Adjutant General is therefore a state militia officer, as well as a state agency head. *See NeSmith v. Fulton*, 615 F.2d 196, 199 (5th Cir. 1980) ("[t]he legislative history of the National Guard Technicians Act also states clearly that Congress viewed the adjutants general as state officers").

As described below in Section I, the Mississippi Guard can have a federal capacity, but only when impressed into federal service by the President. It is undisputed that such did not occur during any of the time periods at issue. Rather, the district court and the Fifth Circuit confused and conflated the Mississippi Guard with a separate federal reserve component entity - the National Guard of the United States - a shell entity populated from time to time with Guardsmen who leave their state National Guard and go onto federal military orders as *individual* soldiers and airmen. *See generally Perpich v. DOD*, 496 U.S. 334, 345-49 (1990) (explaining the purpose and use of National Guard of the United States).

In a typical active component unit in the United States Armed Forces, the unit is able to function year round through the utilization of active duty soldiers, sailors, marines and airmen. 103a. However, as "traditional" or mobilization-day ("M-day") Guardsmen normally perform their duties only on a part-time basis, the Mississippi Guard, like every other state's Guard, must have certain full-time personnel to staff and maintain operations year-round. App. I, 103a-104a.

Decades ago, the States, as well as Congress, recognized this need, and together they created a variety of positions staffed by a variety of personnel to run each state's Guard operations when its "traditional" (part-time) Guardsmen are away at their civilian occupations. 103a. In that regard, the Mississippi Guard, and its concomitant state agency, the Mississippi Military Department, Miss. Code Ann. § 33-5-1, thus utilize a variety of personnel in the accomplishment of

its mission. 103a. One category of military capacity full-time personnel used by Petitioners is 32 U.S.C. § 709 excepted service technicians (Military Technicians). 104a. These Military Technicians are M-day Guardsmen who also hold a full-time position with the Mississippi Guard as nominal federal employees. 104a.

Military Technicians are required to be a member of the Mississippi Guard, to wear their military uniform in the performance of their technician duties, to observe military courtesy and protocol, and to perform duties that are military in nature. 104a. Under 32 U.S.C. § 709, Military Technicians answer solely to their state Adjutant General.

Whether the FLRA may lawfully and constitutionally compel *Petitioners* - who are state actors - to participate in the federal Labor Management Act with respect to their Military Technicians is the central dispute that led to the filing of this case. Importantly, the focus of this case is on the status of the *Mississippi Guard* and its *Adjutant General*, not that of the Military Technicians themselves.

As *Petitioners* do not meet the definition of a federal executive "agency" as set forth by 5 U.S.C. § 7103(a)(3) or of an "activity" under 5 CFR § 2421.4, they are simply not subject to the jurisdiction of, or compulsory commands by, the FLRA. Additionally, even if they did, the application of the Labor Management Act to Petitioners would violate Petitioners' valuable Tenth and Eleventh Amendment rights.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case for three reasons. First, this case presents an issue of national importance, whether the FLRA has the power to order state National Guards and their state Adjutants General to participate in federal union representation elections concerning Guard personnel, and the unintended and negative national security

consequences flowing from the Fifth Circuit's affirmative resolution of that question. Second, the Fifth Circuit's decision is contrary to numerous Tenth and Eleventh Amendment federalism decisions of this Court, and at a minimum exposes new, difficult and important issues created by the intersection of the Technicians Act, *Perpich v. DOD*, 496 U.S. 334, 345 (1990) and *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002). Third, the Fifth Circuit's decision conflicts with the decisions of at least five other Circuits.

The Fifth Circuit's decision that state National Guards and their state Adjutants General are subject to the commands of the Federal Labor Relations Authority, and must submit to federal union representation elections concerning their Military Technician personnel warrants this Court's review. Not only does the Fifth Circuit's decision conflict with *Perpich v. DOD*, 496 U.S. 334, 345 (1990), it also threatens to harm our federal system, as it is important to the interworkings of the Guard and the Active Components that the distinctions of authority and jurisdiction between the federal military and each state's militia be maintained. Additionally, the Fifth Circuit's holding that the Mississippi Guard is a federal agency and part of the National Guard of the United States - a federal reserve component - threatens to criminalize the use of the Mississippi Guard for counter-terrorism and domestic law enforcement operations under the *Posse Comitatus* Act, 18 U.S.C. § 1385, at a time when this Nation is at war on post-911 soil. App. E, 48a, 61a.

Moreover, the Fifth Circuit's opinion ignores this Court's recent federalism rulings in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), *Printz v. United States*, 521 U.S. 898, 935 (1997) and *South Carolina State Ports Authority*, 535 U.S. at 760. For example, in a finding directly contrary to *Printz*, the Fifth Circuit found that a putative statutory designation of the Adjutant General as a federal agent vitiated Petitioners'

valuable Tenth and Eleventh Amendment rights. The Fifth Circuit made such a finding in violation of the Plain Statement Rule, and despite the fact that under *Kimel v. Florida Board of Regents*, 528 U.S. 62, 78 (2000), Congress lacks any authority under its Article I powers to pierce a state actor's sovereign immunity. At a minimum, the decision below deserves this Court's attention so that it may address the new, difficult and important issues created by the intersection of the Technicians Act, *Perpich*, 496 U.S. at 345 and *South Carolina State Ports Authority*, 535 U.S. at 760, which the Fifth Circuit failed to reconcile.

Finally, the Fifth Circuit's opinion is in conflict with the Federal Circuit's recent decision in *Clark v. United States*, 322 F.3d 1358, 1368 (Fed. Cir. 2003), which found the Alabama National Guard to be a state agency and an entity separate and distinct from the National Guard of the United States, a federal reserve component. It is also in conflict with First, Second, Third, Fourth, Seventh and Tenth Circuit decisions, all of which have recognized and protected the Eleventh Amendment immunity of a state Guard or its Adjutant General. *See Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 686 (1st Cir. 1999); *Jones v. New York State Div. of Military Affairs*, 166 F.3d 45, 49 (2d Cir. 1999); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 769 n.3 (7th Cir. 1993), *cert. denied*, 510 U.S. 933 (1993) (citing *Meadows v. State of Ind.* 854 F.2d 1068, 1069 (7th Cir. 1988)); *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1493 (10th Cir. 1983); *Hefrich v. Pennsylvania Dept. of Military Affairs*, 660 F.2d 88, 90 (3rd Cir. 1981); *Henry v. Textron, Inc.*, 577 F.2d 1163, 1164 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047 (1978).

Additionally, the Fifth Circuit's decision conflicts with *Singleton v. Merit Systems Protection Board*, 244 F.3d 1331, 1333 (Fed. Cir. 2001), in which the Federal Circuit found that as a state Adjutant General is not a federal employee, he

therefore is not subject to the commands of federal administrative agencies while serving in a state status. Finally, the Fifth Circuit's finding that the Adjutant General can act in a federal capacity when in a state status is contrary to *Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999) and *United States v. Hutchings*, 127 F.3d 1255, 1258-59 (10th Cir. 1997), both of which found that Guardsmen hold a state capacity unless command authority has been taken away from the Governor and transferred to the President.

I. THE FIFTH CIRCUIT'S FINDING THAT A STATE ADJUTANT GENERAL AND STATE NATIONAL GUARD ARE FEDERAL EXECUTIVE AGENCIES IS CONTRARY TO *PERPICH* AND WILL HAVE UNINTENDED CONSEQUENCES DETRIMENTAL TO THE CONSTITUTIONAL BALANCE AND NATIONAL SECURITY.

The central question in this case is whether the FLRA - a federal instrumentality - may constitutionally dragoon two state actors - a state Adjutant General and National Guard - to unwillingly participate in a federal regulatory program. Ignoring *Perpich v. DOD*, 496 U.S. 334, 345 (1990), as well as the Guard statutory scheme, the Fifth Circuit found that the Mississippi Adjutant General and the Mississippi Guard are federal/state "hybrids," a finding that infects the entire decision and allowed the Fifth Circuit to avoid addressing the major constitutional issues in this case. 6a, 14a-15a n.7.

Specifically, the Fifth Circuit made a fundamental error in holding "[t]hat the AG . . . [and] the MSNG[,] . . . are federal executive agencies . . . , and consequently subject to the jurisdiction of the FLRA." 4a. The Fifth Circuit based this holding on its finding that the Adjutant General and MSNG are "hybrid[s]" - *simultaneously* holding a state and federal status. 6a. However, under controlling federal statutes and

case law, the Adjutant General and the Mississippi Guard have *dual* and mutually exclusive statuses, which is something entirely different from being *hybrids*.

Without so explicitly stating, the Fifth Circuit appears to have employed common law agency principles in its analysis of whether the Adjutant General and the Mississippi Guard are federal Executive agencies. Yet the instant inquiry is not about common law agency principles—rather, it is about whether the Titles 10 and 32 statutory scheme, coupled with the literal language of 5 U.S.C. § 7103(a)(3) and 5 CFR § 2421.4, render the Adjutant General and the Mississippi Guard "[a]n Executive agency" or "[a]ctivity" of an "[a]n Executive agency." 52a, 70a.

In the context of the Guard, Congress has set forth a very carefully crafted statutory scheme which delineates and distinguishes the rights of the States and the Federal Government. This scheme is one premised in large part on important constitutional boundaries of authority—necessitated by the respective spheres of the two Militia Clauses and the War Powers Clause. It is that carefully crafted statutory scheme - not common law agency principles - that must be dispositive. With that premise, the Fifth Circuit's holding - and its underlying rationale - are mistaken for the following reasons, all of which counsel for the grant of a writ of certiorari.

First, the Titles 10 and 32 Guard statutory scheme make it clear that the Adjutant General and the Mississippi Guard's status at any given time *is a function of who has command authority*. Second, the Fifth Circuit's finding that the Adjutant General and the Mississippi Guard are "hybrids" 6a, that can *simultaneously* hold both a state and federal status, is contrary to the holding of *Perpich,* 496 U.S. 345-46, that Guardsmen cannot - as a matter of law - wear a state and a federal hat *at the same time*.

It is true that the Adjutant General, like any Guardsman, took *two* oaths. In his state capacity, he took an oath to the Mississippi Constitution, and enlisted in the Mississippi Guard, a state entity. In that status, as a matter of both state and federal constitutional law, he acts as a state - not federal - officer:

> It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States makes it apparent that military members of the Guard are employees of the States....

Maryland ex rel. Levin v. United States, 381 U.S. 41, 48 (1965), *vacated on other grounds*, 382 U.S. 159 (1965) (citing *Storer Broadcasting Co. v. United States*, 251 F.2d 268, 269 (5th Cir. 1958) ("[a]ll located decisions . . . hold that National Guardsmen of the several states are employees of the state except when in the actual service of the United States")); *accord Perpich*, 496 U.S. at 348 ("[i]ts constitutional aspect is [that] State Guard personnel . . . retain their state affiliation during their periods of service"); *see* 32 U.S.C. § 314 (state law sets duties of the Adjutant General); *see also* Miss. Const. art. V, § 119; Miss. Code Ann. § 33-3-1. 51a, 71a.

It is also true that the Adjutant General, like any Guardsman who holds federal recognition,[2] took a second oath - one to the United States Constitution - and enrolled as a member

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[2] "Federal recognition" merely means that a given Guardsman, in addition to membership in his state's Guard, *may* also be a member of the National Guard of the United States. *See* 32 U.S.C. § 301; *see also Zitser v. Walsh*, 352 F.Supp. 438, 440 (D. Conn. 1972)("One may be a member of the National Guard of a state without receiving federal recognition, but never the reverse").

of an organization separate and distinct from the Mississippi Guard - the National Guard of the United States, a federal reserve component. If actually serving in the National Guard of the United States, the Adjutant General would hold a federal status. However, the statutory scheme and Supreme Court precedent, make it clear that the Adjutant General's respective state or federal statuses are *mutually exclusive*.[3]

More particularly, when serving in the National Guard of the United States, the Adjutant General - like all Guardsmen - loses his state militia status and becomes a Title 10 federal soldier. *See* 10 U.S.C. § 12405 ("Members of the National Guard called into Federal service are, from the time when they are required to respond to the call, subject to the laws and regulations governing the Army or the Air Force, as the case may be . . ."). 58a. Furthermore, *Perpich* held that:

> Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States. [B]ut *unless and until ordered to active duty in the Army, they retained their status as members of a separate State Guard unit. . . .*" *All persons so ordered into the active military service of the United States shall from the date of such order stand relieved from duty in the National Guard of their respective States*, . . . and during such time shall be subject to such laws and regulations for the government of the Army of the United States. . . ." *Upon being relieved from active duty ...all individuals and units shall thereupon revert to their National Guard status.*"

Perpich, 496 U.S. at 345-46 (emphasis added)(some citations omitted). Thus, Guardsmen "[n]ow must keep three hats in their closets - a civilian hat, a state militia hat, and an army hat - *only one of which is worn at any particular*

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[3] To the extent that *NeSmith v. Fulton*, 615 F.2d 196, 198 (5th Cir. 1980), can be read to the contrary, it has been overruled by *Perpich v. DOD*, 496 U.S. 334 (1990).

time." *Id.* at 348 (emphasis added). This is "dual" military status, not "hybrid" status.

Just as one cannot be a little bit pregnant, the Adjutant General cannot simultaneously be a little bit state and a little bit federal. This is because, in the context of the Guard, whether one is in a state or federal status "[d]epends ***solely*** on whether command of the Guardsman has been taken away from a state's governor by one authorized to do so by Congress." *United States v. Hutchings*, 127 F.3d 1255, 1258-59 (10th Cir. 1997) (emphasis added). The Adjutant General is either commanded by the Governor or the President, but *never* both.

Thus, while the Adjutant General certainly holds "dual" statuses, it is simply mistaken - and contrary to *Perpich* - to say he has a "hybrid" status—as found by the Fifth Circuit. *Compare* 13a ("[t]he hybrid character of the AG includes a federal component . . .) *with Perpich*, 496 U.S. at 348 (Guardsmen "[n]ow must keep three hats in their closets - a civilian hat, a state militia hat, and an army hat - *only one of which is worn at any particular time*") *and id.* at 349 (emphasis added) ("[t]he state affiliation is suspended in favor of an *entirely* federal affiliation during the period of active duty").[4] This strict and mutually exclusive duality is important, as the state status of nonfederalized Guardsmen is a "[c]onstitutional aspect" of their service. *Perpich,* 496 U.S. at 349.

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[4] Respondents offered no evidence whatsoever, and the Fifth Circuit did not purport to rely upon any, suggesting that the Adjutant General was serving in the National Guard of the United States during any of the time periods at issue in this Action. *See* 10 U.S.C. § 12401 (National Guard of the United States members "[a]re not in active Federal service except when ordered thereto under law"). 58a. In fact, the Adjutant General did not even hold federal recognition (National Guard of the United States membership) during part of the time at issue. 116a.

Likewise, the Mississippi Guard is not a federal Executive agency or activity. Unlike the National Guard of the United States, the Mississippi Guard is not (*and never is*) a federal reserve component under 10 U.S.C. § 10101.[5] 57a. Rather, under 10 U.S.C. § 101(c)(2), the Mississippi Guard is one of the "[o]rganized militia of the several States. . . ." *Id.* 54a. Admittedly, if the President uses his call power to impress the Mississippi Guard, it becomes part of the Army itself, under 10 U.S.C. § 3062(c), as the Army can include, "[t]he Army National Guard[6] *while in the service of the United States. . . .*" *Id.* (emphasis added). 60a. However, it is undisputed that the Mississippi Guard - the entity - was not impressed[7] during any of the time period at issue. In fact, during any time

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[5]Because federal law does not require a Guardsman to keep his federal recognition in order to remain in a state's Guard, *Zitser v. Walsh*, 352 F. Supp. 438, 440 (D. Conn. 1972), the National Guard of the United States can never contain a state's Guard (the entity), because such would subsume non-federally recognized Guardsmen into the National Guard of the United States, in violation of 10 U.S.C. § 10105. In that regard, Miss. Code Ann. § 33-3-7 does not even require the Adjutant General to hold federal recognition, so long as he is "[e]ligible to receive federal recognition." Mississippi has had periods of time when the then Adjutant General did not hold federal recognition. 116a. As a result, during those time periods (which included some of the time of Respondents' Labor Management Act proceeding), the Adjutant General could not have been a member of the National Guard of the United States as a matter of law.

[6] The federally recognized *parts* of the Mississippi Guard are part of the Army National Guard under 10 U.S.C. § 101(c)(2). 54a. However, the Army National Guard, like the Mississippi Guard, is not a federal reserve component under 10 U.S.C. § 10101. 57a.

[7] Certainly, significant numbers of Mississippi Guardsmen have been mobilized to federal active duty in recent years through their separate membership in the National Guard of the United States. However, the Mississippi Guard itself has not been impressed by Presidential call during the time period at issue. *See Perpich*, 496 U.S. at 350 n.21 (explaining the difference between Presidential impression of a state's Guard itself versus activation of individual National Guard of the United States members).

period when the Mississippi Guard assumes a federal status—*it no longer has any Military Technicians.* This is because upon impression of the Mississippi Guard, its Military Technicians lose their Technician status and become Title 10 soldiers and airmen, as the case may be.[8] 58a.

In other words, the respective States' Militias, (parts of which comprise the term "Army National Guard"), are separate legal entities and are never a part of the National Guard of the United States. Those state entities only become part of the "Army" when "[i]n the service of the United States. . . ," 10 U.S.C. § 3062(c)(1), when impressed by call under federal statutory authority. 60a. *E.g.*, 10 U.S.C. §§ 331-333 & 12406 (authorizing executive officials to call forth the militia of the States). 55a, 58a.

Thus, when in a state status, the Mississippi Guard is a state entity, under the command of the Governor. *E.g., Jones v. New York State Div. of Military Affairs*, 166 F.3d 45, 49 (2d Cir. 1999) (New York Guard is state entity). It only obtains a federal status when and if converted into part of the Army when impressed by Presidential call. 10 U.S.C. § 3062(c)(1); 10 U.S.C. §§ 331-333 & 12406; *Hutchings*, 127 F.3d at 1258-59. 55a, 58a. Absent such an impression, the Mississippi Guard is never a "federal" Executive agency under 5 U.S.C. § 7103(a)(3) or an "activity" of a federal Executive agency under 5 CFR § 2421.4 and cannot be a subjected to federal labor laws. 52a, 70a.

Because the Fifth Circuit found to the contrary, its decision threatens to warp the carefully crafted Congressional and constitutional scheme delineating the respective spheres of state versus federal military power. As evidenced by

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[8] *See* 10 U.S.C. § 12405 ("Members of the National Guard called into Federal service are, from the time when they are required to respond to the call, subject to the laws and regulations governing the Army or the Air Force, as the case may be. . ."). 58a.

Perpich, it is very important - as a matter of Federalism, as well as the interworkings of the Guard and the Active Components - that the distinctions of authority and jurisdiction between the federal military and each state's militia be maintained. Additionally, if left undisturbed, the Fifth Circuit's decision will harm national security.

Soberingly, this Nation is at war. Unlike any other war in recent history, the War on Terrorism is being fought not only overseas, but also - and tragically, as evidenced by the events of September 11 - on our own soil. Each state's National Guard is playing a critical role in this War.

Under the *Posse Comitatus* Act, it has long been accepted that the Guard - because it is not a *part* of the federal military - is not prohibited from engaging in domestic operations—including counterterrorism and law enforcement operations. For example, in the post-911 period, Guardsmen were detailed as security at airports nationwide. These Guardsmen served in a state status - as members of their respective states' Guards - so as not to run afoul of the *Posse Comitatus* Act. *See* (MS Exec. Order no. 850 (Sept. 28, 2001)), App. E, 48a.

However, the Fifth Circuit's holding that the Mississippi Guard is a federal agency and part of the National Guard of the United States, 15a-16a n.8 - a federal reserve component - threatens to criminalize the use of the Mississippi Guard for these and certain other domestic operations. This is because the *Posse Comitatus* Act prohibits the use of "[a]ny *part* of the Army or Air Force as a posse comitatus or otherwise to execute the laws. . . ." 18 U.S.C. § 1385 (emphasis added). 62a.

Under 10 U.S.C. § 3062(c), National Guard of the United States is indisputably *part* of the Army. 60a. Thus, if the Fifth Circuit's finding that the Mississippi Guard is a subpart of the National Guard of the United States stands, some may well contend that use of the Mississippi Guard for certain

domestic counterterrorism and law enforcement operations is a felony. *See Clark v. United States*, 322 F.3d 1358, 1367 (Fed. Cir. 2003) ("To include a National Guard member in a reserve component . . . when he is in service to the state National Guard would be to treat that member as a federal employee, and not as a state serviceman, and would be contrary to [Posse Comitatus]"). Such a result, especially with this Nation at war, would damage national security.

II. JOINT APPLICATION OF THE TECHNICIANS ACT, *PERPICH* AND *SOUTH CAROLINA PORTS AUTHORITY* PRESENTS IMPORTANT ISSUES OF FEDERALISM NOT YET ADDRESSED BY THIS COURT.

It is well established that, "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). This "plain statement" rule is not met by a mere "general authorization for suit in federal court. . . ." *Scott v. Univ. of Miss.*, 148 F.3d 493, 499 (5th Cir. 1998), *abrogated on other grounds by Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). Rather, both the text and structure of the statute must "make[] it clear that the State is the [intended] Defendant in the suit." *Id.*

The Adjutant General - a state officer - and the Mississippi Guard - a state entity - are entitled to sovereign immunity under the Eleventh Amendment,[9] and their immunity extends

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[9] *See Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 686 (1st Cir. 1999); *Jones v. New York State Div. of Military Affairs*, 166 F.3d 45, 49 (2d Cir. 1999); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 769 n.3 (7th Cir. 1993), *cert. denied*, 510 U.S. 933 (1993)(citing *Meadows v. State of Ind.*, 854 F.2d 1068, 1069 (7th Cir. 1988)); *Hefley v. Textron,*

to federal administrative proceedings - like those at issue here - that are initiated by private parties such as Association of Civilian Technicians, a union. *E.g., Federal Mar. Comm. v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002) ("[s]tate sovereign immunity bars [federal administrative agencies, like the FLRA] from adjudicating complaints filed by a private party against a nonconsenting State").

Here, the Fifth Circuit found the Adjutant General and the Mississippi Guard to have no Eleventh Amendment immunity—implicitly holding that such had been pierced through Congress' putative designation of them as federal Executive agencies or activities under the Technicians Act. 14a-15a n.7. However, the Fifth Circuit itself *repeatedly* admits that there is *no* plain statutory statement by Congress, reflecting any intent to pierce these state actors' immunities.

For example, the decision's operative portion states that upon review of the actual statutory language - which of course should control the outcome - "[w]e begin to get into a thicket. . . ." 9a. Maneuvering through that "thicket," the Fifth Circuit then "[f]ind[s] that the broad and somewhat circular terms of the statutory definitions of agency and Executive agency are *non-dispositive* in resolving the specific question that this appeal presents." 12a-13a n.6 (emphasis added).

This finding is not surprising, as if the Fifth Circuit had found the actual statutory words dispositive, the Fifth Circuit implicitly concedes it would have to rule the other way:

Inc., 713 F.2d 1487, 1493 (10th Cir. 1983); *Hefrich v. Pennsylvania Dept. of Military Affairs*, 660 F.2d 88, 90 (3rd Cir. 1981); *Henry v. Textron, Inc.*, 577 F.2d 1163, 1164 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047 (1978); *Richardson-Longmire v. Kansas, Adjutant General*, no. Civ.A.97-2679, 1997 WL 156168 (D. Kan. March 8, 1999); *Petr v. Delaware Nat'l Guard*, Case No. 94-327-SLR, 1995 WL 579634 (D. Del. Sept. 28, 1995); *Intrioni v. South Carolina Nat'l Guard*, 828 F.Supp. 391, 396 (D. S.C. 1993).

"[w]e must admit that if one is searching for translucent, definitional, statutory words under the Labor Management Act stating that the entities composing the [Mississippi Guard] constitute an 'Executive agency,' the search will be disappointing." 13a. A "thicket" is not a "plain statement."

Additionally, even if there was a plain statement - which there is not - Congress must have constitutional authority to pierce a state's Eleventh Amendment immunity. Here, Congress could not pierce Petitioners' immunity as the Militia Clauses are part of Article I of the Constitution and "[C]ongress lacks power under Article I to abrogate the States' sovereign immunity." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 78 (2000). The Fifth Circuit's opinion ignores this black letter rule of law.

In *Perpich v. DOD*, 496 U.S. 334, 345, 350 n.21 (1990), this Court made it clear that state National Guards are state agencies, unless impressed into federal service by Presidential call. Further, this Court made it clear that Guardsmen are not in federal service merely because they hold a separate membership in the National Guard of the United States. *Id.* at 345. These holdings should have entitled the Mississippi Guard and its Adjutant General to the full benefits of this Court's Eleventh Amendment case law, including *Gregory*, 501 U.S. at 460, *Kimel*, 528 U.S. at 78 and *South Carolina State Ports Authority*, 535 U.S. at 760.

However, employing the Technicians Act, 32 U.S.C. § 709, in a context to which it does not apply - federal unionization proceedings - the Fifth Circuit found that the Adjutant General's putative status as a federal agent in administering his Military Technicians somehow converted him into a federal "Executive agency" under an entirely different federal statutory scheme, the Labor Management Act. 18a. Ignoring not only the Plain Statement Rule, but also this Court's explanation of the state nature of the Guard and its personnel in *Perpich*, the Fifth Circuit thereafter found the Labor

Management Act to trump Petitioners' Eleventh Amendment rights. 14a-15a n.7. Petitioners therefore respectfully submit that certiorari should be granted to address the intersection of the Technicians Act, *Perpich* and *South Carolina State Ports Authority*, as these new, difficult and important federalism issues were incorrectly decided by the Fifth Circuit in a manner that will harm our federal system.

III. THE FIFTH CIRCUIT'S DECISION THAT PETITIONERS' PUTATIVE FEDERAL AGENCY STATUS TRUMPS THEIR TENTH AMENDMENT IMMUNITY IS CONTRARY TO *PRINTZ*.

The Fifth Circuit gave short shrift to the Petitioners' Tenth Amendment rights. Relegating Petitioners' important constitutional rights to a mere footnote, the Fifth Circuit found that those rights do not attach as "[t]he conclusion that the AG is a federal agency, subject to the [Labor Management Act] in its federal capacity, renders *Printz* inapposite." 14a-15a n.7. This conclusion is mistaken, because as discussed in detail above, neither the Mississippi Guard nor the Adjutant General are "[a]n Executive Agency" under 5 U.S.C. § 7103(a)(3). 52a. In any event, and quite importantly to the instant appeal, *even if* either or both of them were a statutory federal "agent" with respect to Military Technicians under 32 U.S.C. § 709, such would not change the constitutional inquiry. 67a.

In *Printz v. United States*, 521 U.S. 898, 935 (1997), a federal statute, 18 U.S.C. § 922, *specifically* designated state law enforcement officers to administer part of the Brady Act. *Printz*, 521 U.S. at 903. 61a. That explicit federal statutory designation arguably made them statutory federal "agents." Despite this fact, it did not in any way vitiate those state officials' Tenth Amendment immunities, and this Court had no hesitation in holding that:

> Congress cannot compel the States to enact or enforce a federal regulatory program. [Further,] Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may [not] command the States' officers ...to administer or enforce a federal regulatory program.

Printz, 521 U.S. at 935.

Here, Respondents are doing exactly what this Court prohibited in *Printz*. By coercively dragooning the Mississippi Guard and its Adjutant General to enforce a federal regulatory program - the Labor Management Act - they are violating the Tenth Amendment. 50a, 104a, 108a.

Simply put, the Fifth Circuit's reasoning that 5 U.S.C. § 7103(a)(3) of the Labor Management Act trumps Petitioners' Tenth Amendment rights is contrary to *Printz*. It is circuitous to argue that since involuntary statutory conscription of a state actor through the Labor Management Act would render him a federal agent, the resulting agency status constitutionally immunizes the underlying conscription. This very reasoning was rejected in *Printz*, a case which - unlike here - had an *explicit* federal statutory conscription of a state official.

Here, the Respondents, at the behest of Association of Civilian Technicians, a private party, are seeking to conscript the Petitioners into administering and participating in a federal regulatory scheme, the Labor Management Act. 104a-108a. However, under *Printz,* such a commandeering is unconstitutional. Petitioners respectfully submit that this Court should grant certiorari to clarify the rule in *Printz*—that Congress may not obviate the constitutional prohibition on involuntary conscription of state officers by means of a federal statutory mandate.

IV. THE FIFTH CIRCUIT'S OPINION HAS CREATED SPLITS BETWEEN THE CIRCUITS.

Not only is the Fifth Circuit's decision contrary to this Court's decisions in *Perpich*, 496 U.S. at 345-46, *Gregory*, 501 U.S. at 460, *Kimel*, 528 U.S. at 78, *Printz*, 521 U.S. at 935 and *South Carolina*, 535 U.S. at 760, it further has created splits between the Circuits on a number of issues.

First, in *Clark v. U.S.*, 322 F.3d 1358 (Fed. Cir. 2003), the Federal Circuit analyzed one of the key issues also in the instant case - the relationship between a state Guard and the separate and distinct federal entity the National Guard of the United States. *Clark* found:

> Although the National Guard of the United States is a reserve component, the Alabama National Guard, . . . is not a reserve component of a uniformed service. It becomes clear, when we consider Supreme Court precedent and the statutory scheme . . . , that the National Guard and the National Guard of the United States are separate and distinct entities.
>
> . . . .
>
> Case law thus establishes that when National Guard members are not activated into federal service, they are not treated as federal employees.
>
> . . . .
>
> In short, National Guard members are only serving in the federal military when they are called into formal military service.

Clark, 322 F.3d at 1365, 1366 & 1368.

Contrary to *Clark*, the Fifth Circuit decision in this case adopted the district court's finding that the Mississippi Guard is a subpart of the National Guard of the United States, 15a-16a n.8, not an entity which is "separate and distinct" as found by the Federal Circuit in *Clark*. Further, and also

contrary to *Clark*, the Fifth Circuit decision effectively treats the Adjutant General as a federal employee, even when he is "not activated into federal service. . . ." *Clark*, 322 F.3d at 1368. 18a.

Clark is not the only Circuit decision in conflict with the instant case. By finding that Petitioners were federal agencies or activities, 16a, the Fifth Circuit found Petitioners to have no Eleventh Amendment immunity. However, First, Second, Third, Fourth, Seventh and Tenth Circuit decisions - contrary to the result here - all have recognized the Eleventh Amendment immunity of a state Guard. *See Day v. Massachusetts Air Nat'l Guard,* 167 F.3d 678, 686 (1st Cir. 1999); *Jones v. New York State Div. of Military Affairs*, 166 F. 3d 45, 49 (2d Cir. 1999); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 769 n.3 (7th Cir. 1993), *cert. denied*, 510 U.S. 933 (1993)(citing *Meadows v. State of Ind.* 854 F.2d 1068, 1069 (7th Cir. 1988)); *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1493 (10th Cir. 1983); *Hefrich v. Pennsylvania Dept. of Military Affairs*, 660 F.2d 88, 90 (3rd Cir. 1981); *Henry v. Textron, Inc.*, 577 F.2d 1163, 1164 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047 (1978).

The Fifth Circuit's opinion is further is in conflict with *Singleton v. Merit Systems Protection Board*, 244 F.3d 1331, 1333 (Fed. Cir. 2001), in which the Federal Circuit found the Merit Systems Protection Board lacked authority to issue orders to the Ohio Adjutant General, even though the statute at issue - 5 U.S.C. § 1204(a)(2) - is even narrower in scope of enforcement power than 5 U.S.C. § 7118(a)(7) of the Labor Management Act. Here, the Fifth Circuit ignored the plain language of the Labor Management Act statutes at issue, and, employing common law agency rules, found the FLRA to have the authority to issue compulsory orders against a state Adjutant General, a result contrary to *Singleton*. 12a, 18a.

Additionally, the Fifth Circuit's finding that the Adjutant General can act in a federal capacity though in a state

command status, 13a, is contrary to Sixth and Ninth Circuit decisions. For example, in *Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999) (quoting B. Rich, *The National Guard and Posse Comitatus*" 1994 Army Law 16, 19) the Sixth Circuit held that "'[t]he issue of status depends on command and control and not on whether: state or federal benefits apply; state or federal funds are being used; the authority for the duty lies in state or federal law; or any combination thereof.'" Further, in *United States v. Hutchings*, 127 F.3d 1255, 1258-59 (10th Cir. 1997) (emphasis added), the Tenth Circuit found that in the context of the Guard, whether one is in a state or federal status "[d]epends ***solely*** on whether command of the Guardsman has been taken away from a state's governor by one authorized to do so by Congress." These Circuit splits additionally counsel for the grant of certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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